No. 90-118

IN THE

Supreme Court of the United States

October Term, 1990

KEITH MILTON RHINEHART
and
THE AQUARIAN FOUNDATION,
Appellants,

v.

KIRO, INC.
and
THE CHURCH OF JESUS CHRIST
OF LATTER DAY SAINTS,
Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals
of The State of Washington

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review petitioners' latest (*fifth*) attempt to persuade this Court that they are immune from civil discovery rules simply because they claim a religious affiliation?

2. May plaintiffs in an action seeking damages for defamation, and denying public figure status, despite entry of a stipulated protective order, deliberately withhold relevant evidence on damages, public figure status and/or truth issues?

3. Should this Court review the factual findings by the Washington courts that petitioners willfully disobeyed court orders compelling discovery?

RESTATEMENT OF PARTIES TO THE PROCEEDINGS BELOW

The parties before the trial court were as follows:

Plaintiffs: Keith Milton Rhinehart; The Aquarian Foundation; and Linda Dunn.

Defendants: KIRO, Inc.; and The Church of Jesus Christ of Latter Day Saints.

Petitioners in this proceeding are Keith Milton Rhinehart and The Aquarian Foundation.[1] Respondents are KIRO, Inc. and The Church of Jesus Christ of Latter Day Saints.

KIRO, Inc. is a Utah corporation. Its parent company is Bonneville International Corporation, also a Utah corporation. All subsidiaries of Bonneville International Corporation are wholly owned. The Church of Jesus Christ of Latter Day Saints is also known as the Mormon Church; it owns Bonneville International Corporation.

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[1] Petitioners' caption and the Statement of Parties to the Proceeding incorrectly identify Linda Dunn as an "appellant" or other party to this proceeding. Summary judgment was entered in the trial court against Ms. Dunn. She did not appeal that ruling and was thus not a party to the appeals in the Washington courts from which review is sought.

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OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The trial court entered an Order Compelling Responses to Discovery Requests on May 5, 1988. CP 130-31.[2] An Order of Dismissal was entered by the trial court on June 8, 1988. CP 811-13; Petition, Appendix 2. The Washington Court of Appeals granted respondents' motion on the merits by a

[2] "CP" refers to the Clerks' Papers in the Washington State Court of Appeals. "SCP" refers to Supplemental Clerks' Papers in the Washington State Court of Appeals.

written order entered June 13, 1989. Petition, Appendix 1. The petitioners' motion to modify the ruling on the motion on the merits was denied by an Order Denying Motion to Modify, Motion to Strike and Impose Sanctions dated August 9, 1989. Petition, Appendix 3. The Washington Supreme Court denied the petitioners' Petition for Review on January 9, 1990. *Rhinehart, et al. v. KIRO, Inc.*, 113 Wn.2d 1035, 785 P.2d 825 (1990).

STATE LAW INVOLVED

The petition raises the question of the validity of Washington Superior Court Civil Rule 37(b)(2)(C) as applied to petitioners. Civil Rule 37(b) lists sanctions available against a party failing to comply with a court order compelling discovery. In pertinent part, Civil Rule 37(b)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * *
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action* or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

[Emphasis added.]

RESTATEMENT OF THE CASE

A. Background and Prior Cases.

Petitioners Keith Milton Rhinehart ("Rhinehart") and his Seattle-based spiritualist organization, The Aquarian Foundation (the "Foundation"), are no strangers to litigation. This is the *fifth* case in which Rhinehart or the Foundation have asked *this* Court to review orders of dismissal for willful failure to comply with court-ordered discovery:

- *Rhinehart v. Seattle Times Co.*, __U.S.__, 467 U.S. 1230 (1984) (denying certiorari as to a similar order compelling discovery of one of the videotapes and membership data at issue in this petition);
- *Rhinehart v. Tribune Publishing Co., Inc.*, 484 U.S. 805 (1987) (dismissing appeal of action against KIRO, Inc. and others challenging orders compelling discovery of the same videotapes and membership/damages information at issue in this petition);
- *Aquarian Foundation v. Law Offices of Edwards & Barbieri*, 484 U.S. 892 *reh. denied*, 484 U.S. 1083 (1988); *on remand review denied*, 112 Wn.2d 1003, *cert. denied*, 110 S. Ct. 61 (1989) (dismissing appeal and denying certiorari in action dismissed upon failure to disclose Foundation members' addresses);
- *Rhinehart v. Seattle Times Co.*, 109 S. Ct. 1736 (1989) (dismissing appeal in action dismissed for failure to provide one of the videotapes and membership/damages data at issue in this petition).

All five cases involve the same pattern of discovery abuse by petitioners. The prior cases feature many of the same arguments on appeal, arguments this Court has determined four times are unworthy of review.

B. Allegations and Discovery Attempts in The Present Case.

The summons and complaint in this case were filed on February 28, 1986. CP 1. The complaint alleges that plaintiffs were defamed by news reports broadcast by KIRO-TV in early 1984 on the subject of cults.[3] CP 3-7. The complaint also alleges that Rhinehart is a *private* figure. CP 3. With respect to damages, the complaint alleges that the Foundation "depends upon financial support primarily from its membership," and that respondents' wrongful acts "have prevented the accomplishment of the Foundation purposes and have directly caused financial losses." CP 7.

KIRO served interrogatories and requests for production of documents upon Rhinehart and the Foundation on December 18, 1987. CP 15. Among the subjects addressed by the discovery requests were plaintiffs' damage claims, Rhinehart's status as a public figure, and certain unorthodox practices of the Foundation relevant to its description as a cult.[4] See CP 20-68. Rhinehart and the Foundation failed to answer, respond, or object, as required, within 20 days of service. CP 16.

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[3] Contrary to the inaccurate description that appears in the petition at 7-8, the sole reference to petitioners in KIRO's broadcasts was a picture of the Foundation's Seattle headquarters that remained on the screen for four (4) seconds, preceded and followed by pictures of other Seattle-based cults. There was no audio broadcast concerning petitioners. SCP 7; see CP 253 (videotape of KIRO's broadcasts).

[4] *Webster's New Collegiate Dictionary* (1976) defines "cult" as "A religion regarded as unorthodox or spurious; also: its body of adherents." The Foundation is given to such unorthodox practices as seances, "bizarre performances," and apportation (*i.e.*, extracting "gems" from bodily orifices for sale to adherents). *See Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 227, 654 P.2d 673 (1982), *aff'd sub nom. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

Following an exchange of letters, KIRO's attorney granted Rhinehart and the Foundation an extension of time to February 15, 1988, to answer and respond to KIRO's first discovery requests. CP 16-17, 70-73. Petitioners' responses, served February 15, 1988, were incomplete and evasive, and petitioners refused to produce documents unless a protective order was entered. CP 17, 74-75. Respondents then stipulated to a protective order proposed by *petitioners*, which the trial court entered on March 9, 1988. CP 17, 76-78; CP 13-14.

On March 9, 1988, petitioners produced summary financial statements for the Foundation for the years 1981-1985. Petitioners produced none of the other documents that KIRO had specifically requested. CP 17. When petitioners missed yet another deadline for production, KIRO brought a motion to compel discovery. CP 108-114.

C. The Order Compelling Discovery.

On May 5, 1988, the trial court entered an Order Compelling Responses to Discovery Requests (the "Discovery Order"). CP 130-131; see CP 188-219 (verbatim report of oral argument and the court's ruling). The Discovery Order required production of *three* videotapes and Foundation membership records no later than May 13, 1988. The Discovery Order cautioned that failure to comply would subject appellants to additional sanctions under Civil Rule 37, including dismissal. CP 131.

Rhinehart and the Foundation ignored the trial court's May 13 deadline. On May 19, 1988, respondents moved for dismissal under Civil Rule 37 and for summary judgment. CP 220-249; SCP 38-42.[5] Petitioners thereafter advised the

[5] Respondents sought summary judgment dismissing petitioners' defamation claims on several alternative grounds, including opinion, truth, lack of actual malice, and lack of damages. See SCP 10-24. Because of its disposition of petitioners' claims under Civil Rule 37, the trial court did not rule on respondents' motion for summary judgment against petitioners.

trial court that they would not provide either the membership information or the videotapes that they had been ordered to produce. CP 798-801. They also asserted, for the first time, that Rhinehart lacked authority to produce Foundation membership records. CP 805-806.

D. The Order of Dismissal.

On June 3, 1988, the trial court heard argument on respondents' summary judgment motion and motion to dismiss. On June 8, 1988 the court entered summary judgment dismissing the claims of plaintiff Linda Dunn. That judgment has not been appealed. The court also entered an order dismissing petitioners' claims under Civil Rule 37. CP 811-814. Petition, Appendix 2.

In its dismissal order, the trial court found that Rhinehart and the Foundation had deliberately and willfully violated the Discovery Order, that they had been placed on notice that the consequence of failure to comply was dismissal with prejudice, and that their violations of the Discovery Order were preceded by their violations of substantially identical orders in *four* other cases. The trial court also found that the materials petitioners had refused to produce were relevant and material to the issues of truth, public figure status, and damages; that petitioners' refusal to produce the materials had substantially prejudiced respondents' ability to prepare for trial; and that petitioners' violation of the Discovery Order was unjustified and unexcused. CP 812-813. Petition, Appendix 2.

E. Subsequent Proceedings on Appeal.

The Court of Appeals affirmed the trial court's order of dismissal. Petition, Appendices 1 and 3. Contrary to petitioners' claims in their petition (at 15-16 and 18), the Court of Appeals addressed specifically the "balancing" and "authority" issues. *See e.g.*, Appendix 1 at 23-25.

ARGUMENT

1. This Case Presents No Substantial Question Not Previously Decided by This Court.

Petitioners argue first that their membership lists should be protected from discovery under the First Amendment's guarantee of freedom of association. This argument was explicitly rejected in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 257-258, 654 P.2d 673 (1982), *aff'd sub nom. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court in that case held that a protective order adequately safeguarded the plaintiffs' interests in privacy and association, while still allowing defendants to develop their defenses. *Id.*, 98 Wn.2d at 258. This Court thereafter denied the petition for certiorari. 467 U.S. 1230 (1984). In the present case, petitioners cannot challenge the adequacy of the protective order that was entered, because *they* prepared it.

Petitioners also argue that their membership and donation records are irrelevant, since loss of members and donors is not at issue in this case. But petitioners' complaint seeks damages based on the allegation that members and donors were lost as a result of KIRO's broadcasts.[6] Petitioners' responses to KIRO's discovery requests elaborated on these damages as follows:

> The Aquarian Foundation suffered *loss of members and new memberships;* disruption of its activities; its members suffered from scorn, ridicule, threats of violence; actual violence; *loss of income from donations, contributions, loss of goodwill;* expenses for increased security of

[6] The petition (at 8 and 17) suggests that this claim was withdrawn. Petitioners' statement of the case is misleading at best. Petitioners never asked to or did amend their complaint against respondents. Their interrogatory responses describing those alleged damages (CP 64-65) were never supplemented, amended or withdrawn.

> Church and parsonage; increased legal expenses; increased telephone expenses . . .
>
> The method used to calculate the damages is based on the *loss of membership, reduced new members, and loss of income from contributions, donations, and gifts* . . .

CP 64-65 (answers and responses sworn to by Rhinehart on February 9, 1988) (emphasis added.)

It was not until oral argument on respondents' motion to compel that petitioners' counsel admitted petitioners had no proof to support their claim:

> [M]y clients have not identified any particular monetary losses, losses of donations or losses of members as a specific result of this broadcast.

CP 198. Petitioners then attempted to evade discovery of member and donor records. See CP 199-201. The trial court rejected this ploy:

> I do believe that [membership or donation information] is relevant to special damages which are claimed and to general damages, as well, and that information should be produced.

CP 212.

The trial court also ordered petitioners to produce *three* videotapes of public performances by Rhinehart: a videotape depicting ectoplasm production[7] first broadcast on Japanese national television; a broadcast (called "Way Out") shown on a Tacoma, Washington television station; and a videotape of Rhinehart's 1978 "morality presentation" to several hundred inmates at Walla Walla State Prison. The trial court ruled

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[7] *Webster's New Collegiate Dictionary* (1976) defines "ectoplasm" as "a substance held to produce spirit materialization and telekinesis."

that the videotapes were relevant not only to Rhinehart's status as a public figure, but also to the truth of KIRO's broadcast. CP 210-211. Specifically, the videotapes depict some of the unorthodox practices characteristic of a cult.

Petitioners' arguments about the videotapes are completely without merit. First, the petition ignores (at 9) two of the three videotapes that the trial court ordered produced. Second, petitioners fail to discuss at all the relevance of the tapes to the issue of unorthodox practices and the truth of the broadcasts. Petitioners then raise the same free exercise and "balancing" arguments that *this* Court declined to review on four prior occasions. *See* list of prior cases at p. 3, *infra.*

2. The Courts Below Balanced Petitioners' Interests and the Protective Order They Obtained with the Prejudice Created by Their Refusal to Permit Discovery.

Petitioners' claim that the Washington courts failed to "balance" their rights with the interests of petitioners (petition, at 15-17) is simply untrue. The text of the orders of the Washington courts demonstrates that such a balancing of rights and interests did indeed occur. CP 811-814. Petition, Appendix 1 (at 23-24) and Appendix 2 (at 27). Most important, any interests petitioners had in protecting against unwarranted disclosure of documents were addressed by the protective order proposed by *petitioners.* CP 17, 76-78.

As for prejudice, petitioners confuse the elements of their cause of action with the evidence KIRO needed to establish its defenses, such as truth, public figure status, and lack of damage. Petitioners simply stymied respondents' preparation of their case. In forcing respondents repeatedly to seek compliance with the discovery rules and then judicial relief, petitioners ran up the cost and prolonged the dangerous "chilling effect" of this litigation. *See Mark v. Seattle Times,* 96 Wn.2d 473, 484-485, 635 P.2d 1081 (1981), *cert denied,* 457

U.S. 1124 (1982). Dismissal was the only adequate and appropriate response to such conduct.

Petitioners' authorities provide no conflicts among jurisdictions or any unsettled issue of law under the considerations set forth in Supreme Court Rule 10. For example, petitioners placed in issue in this case their status as public figures, and damages arising from loss of reputation, membership and donors. CP 3-7. Thus, discovery relating to public figure status (*e.g.*, public broadcasts featuring petitioners) and to damages from loss of membership are not only relevant but critical to respondents' defenses.

Accordingly, this case is unlike the several cases cited in the petition in which the information sought (usually membership data) had no relevance whatsoever to the issues in those cases. *E.g., Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Eilers v. Palmer*, 575 F. Supp. 1259 (D. Minn. 1984); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979).

By contrast, in other cases cited by petitioners the courts found that disclosure of otherwise protected data was appropriate if relevant to the issues of the case. *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd sub nom., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See also Hastings v. North End Independent School District*, 615 F.2d 628, 632 (5th Cir. 1980) (when disclosure of membership data is relevant to defense, trial court may compel disclosure).

Lastly, in cases in which a plaintiff has sought *no damages* at all, inquiry into lost membership may have no purpose. If

neither special damages for lost members or donors nor general damages for lost reputation are at issue, neither is the status of a plaintiff's membership. Accordingly, the decisions in *Church of Hakeem v. Superior Court*, 110 Cal. App. 3d 384 (Ct. App. 1980) and *Familias Unidas v. Briscoe*, 544 F.2d 182, 186 (5th Cir. 1976) are straightforward; there were *no* damage claims in those cases.

That is certainly not the case here. CP 7 (Complaint); CP 64-65 (Rhinehart interrogatory answers). Petitioners clearly placed in issue their general and special damages arising from lost membership, as well as petitioners' public figure status.[8]

3. The Courts Below Found That Rhinehart Had Authority to Permit Discovery, and He Expressly Forbade the Discovery at Issue.

Finally, petitioners argue (at 18) that Rhinehart's claims should not have been dismissed because he had no unilateral authority to compel discovery by the Foundation. This attempted distinction between the Foundation and its "ecclesiastical leader" runs counter to the allegations in the complaint and is belied by petitioners' discovery responses. See CP 3, 6; CP 47.

The argument is, in any event, completely disingenuous. There is no suggestion that Rhinehart requested or recommended that discovery be produced as required by the trial court. On the contrary, he expressly forbade it. CP 62-63; CP 223-224. The trial court and the Washington Court of Appeals so found. See Petition, Appendix 2 at 23 (¶ 1) and Appendix 1 at 25.

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[8] The Washington courts have recognized that a party-plaintiff may not rely on a privilege to bar inquiry into a matter which plaintiff placed in issue. *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (implied waiver of attorney-client privilege in attorney malpractice action).

Petitioners' reliance on *Societe Internationale Pour Participations Industrielles et Commerciales v. Rodgers*, 357 U.S. 197 (1958) is similarly disingenuous. The court in that case excused non-compliance with discovery because it occurred in good faith and under an honest belief that it may violate the laws of the foreign country under which that party was founded. Here, there is no finding of good faith by the petitioners. To the contrary, the courts below found the violations of discovery orders were deliberate and calculated.[9]

CONCLUSION

For the reasons stated above, respondents submit that this case presents no substantial question not previously decided by this Court. The petition should be denied.

Respectfully submitted this 3rd day of August, 1990.

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[9] It is noteworthy that Rhinehart's claim in this case that he had no "authority" to disclose the requested information conflicts with his position in prior litigation. *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987) (Rhinehart offered to allow the inspection but not the copying of the videotapes at issue in this petition).